



July 14, 2000

Ms. Katherine Minter Cary  
Public Information Coordinator  
Office Of The Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2000-2668

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137040.

The Office of the Attorney General (the "OAG") received a written request for all records pertaining to the proposal submitted by Lockheed Martin IMS ("Lockheed") in response to the State Disbursement Unit RFP Number 192306, the evaluation of the Lockheed proposal, the selection of Lockheed as the proposer with whom to negotiate a State Disbursement Unit Contract, and the Contract awarded to Lockheed. You state that some responsive information has been released to the requestor. You contend that the remaining requested information is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code. Additionally, you have requested a decision from this office pursuant to section 552.305 of the Government Code with regard to certain proprietary information submitted to the OAG by Lockheed.

Section 552.107(1) of the Government Code excepts from required public disclosure information coming within the protection of the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and client confidences. *See* Open Records Decision No. 574 (1990).

Most of the OAG documents at issue consist of various e-mail communications from and between OAG attorneys as well as between OAG attorneys and other staff members, drafts of documents prepared by OAG attorneys or specifically for those attorneys' review, and intra-office memoranda addressing legal issues affecting the OAG. After reviewing the information at issue, we agree that most of these documents come within the attorney-client privilege in that they reveal either privileged client confidences or an attorney's legal opinion

or advice. Accordingly, we conclude that the OAG may withhold most of the documents for which you have asserted the attorney-client privilege pursuant to section 552.107(1) of the Government Code.

You also contend that some of the documents at issue are excepted from required public disclosure pursuant to section 552.111 of the Government Code, which protects from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. Open Records Decision No. 615 at 5 (1993); *see also Austin v. City of San Antonio*, 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5 (1993).

Additionally, in Open Records Decision No. 559 (1990), this office held that a preliminary draft of a document *that is intended for release in a final form* necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such may be withheld pursuant to the predecessor of section 552.111. The draft documents before us directly pertain to policy matters concerning the OAG.

We agree that several of the documents at issue consist of advice, opinion, or recommendation, including draft documents, protected by section 552.111. We have marked with yellow flags the documents that the OAG may withhold pursuant to section 552.111.

However, some of the OAG documents you have submitted for our review do not come under the protection of section 552.107(1), 552.111, or any of the other exceptions you have raised. Accordingly, we have placed blue flags on the documents that the OAG must release to the public.

As noted above, you have also requested a decision from this office pursuant to section 552.305 of the Government Code, which authorizes parties with a privacy or proprietary interest in requested information to submit arguments to this office as to why the information is excepted from required public disclosure. In accordance with section 552.305(d), the OAG notified Lockheed of the current records request.

Lockheed has identified specific groups of documents that it contends come under the protection of section 552.110, and has submitted an affidavit in support of its contentions. Specifically, Lockheed contends that the identified portions of its bid proposal and other documents would reveal its processes, methodologies, and strategies, as well as technical information relating to software it has developed.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause

substantial competitive harm to the person from whom the information was obtained. Lockheed contends that both branches of section 552.110 apply to portions of its proposal and other related documents.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>1</sup> *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

After reviewing the information at issue, we conclude that Lockheed has demonstrated how the release of much of its proprietary information would result in substantial competitive injury for purposes of section 552.110(b). Specifically, we conclude that the OAG must withhold the following groups of documents:

From Lockheed's proposal:

1. pp. 1.0-1 through 1.05
2. pp. 2.3-1 through 2.3-11
3. pp. 2.3.1-1 through 2.3.4-6
4. pp. 2.3.8-1 through 2.4-6
5. pp. 2.4.4-1 through 2.4.4-6
6. pp. 2.4.9-1 through 2.4.9-26
7. pp. 2.5-5 through 2.5-40

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

From Lockheed's BAFO dated January 31, 2000:

1. pp. 2.4-1 through 2.4.2-5
2. Addendum 4

Miscellaneous documents:

1. November 15, 1999 Price Proposal (superseded)
2. December 27, 1999 letter to OAG

On the other hand, Lockheed has not demonstrated how some of its documents come under the protection of either subsection of section 552.110. Accordingly, the OAG must release the following documents to the requestor:

1. All pricing documents from the final "BAFO"
2. WTDROC pricing documents
3. Proposal pp. 2.7-19 through 2.7-24
4. Proposal pp. 2.7-63 through 2.7-127

To summarize, the OAG may withhold most of the internal e-mail communications, intra-office memoranda, and draft documents pursuant to sections 552.107(1) or 552.111 of the Government Code. OAG documents with blue flags must be released to the public. The OAG must withhold Lockheed's proprietary information, as outlined above; the remaining information from Lockheed must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Julie Reagan Watson  
Assistant Attorney General  
Open Records Division

JRW/RWP/ljp

Ref: ID# 137040

Encl. Submitted OAG documents

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